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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 242

JORGE I. ROSSO AND WIFE CARMEN DESCARTES,
APPELLANTS

v.

COMMONWEALTH OF PUERTO RICO
APPELLEE.

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL

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Appellee contends that the questions raised in the Jurisdictional Statement are not substantial and that therefore the appeal should be dismissed.

First Question

As to the first question raised, whether since the taking was not for any specific present but for an undetermined and unspecified use in the future, there being no public necessity therefor, it was without due process in violation of

the Fourteenth and Fifth Amendments, appellee's contention is grounded in large measure on the statement of Mr. Justice Moody in the case of *Hairstone* v. *Danville & W.R. Co.*, 208 U.S. 598, 607 (1908) that

> "... No case is recalled where this Court has condemned as a violation of the 14th Amendment, a taking upheld by the state court as a taking for public uses in conformity with its laws."

and on the circumstance that the Supreme Court of Puerto Rico upheld the taking in this case.[1] In the *Hairstone* Case, however, this Court did consider as substantial the question raised as to whether the taking was for a public use (land for a railroad siding), and it painstakingly revjewed thoroughly both the evidence and the law in plenary proceedings.

So too while in the case of *Cincinnati* v. *Vester,* 281 U.S. 439, 446, cited and relied upon by appellee, this Court per Mr. Chief Justice Hughes said:

> ". . . In deciding such a question the Court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgments of state courts as to the uses considered to be public in the light of local exigencies. . . .".

the question as to whether the taking was for a public purpose, was considered to be substantial and the case was reviewed in plenary proceedings and the judgment of the Federal District Court enjoining the city from taking the property was affirmed.[2]

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[1] Both the Fifth and Fourteenth Amendments are specified in this question in view of the decision of the United States Court of Appeals in the case of *Mora* v. *Mejias*, 206 F. 2d 377.

[2] In the Vester Case (281 U.S. 443) this Court said: "The ordinance providing for the excess appropriation was not more specific, declaring simply that it is 'in furtherance of the public use' described as the widening of Fifth Street, and 'for the most complete enjoyment and preservation of the benefits to accrue from said public use'. In what way, the excess condemnation of these properties was in fur-

And in the case of *Rindge Co.* v. *Los Angeles County,* 262 U.S. 700, also cited and relied upon by appellee, this Court considered the question as to whether the taking was for a public use to be substantial and subjected the judgment of the state court to plenary review. In the case of *U.S. Ex. Rel. T.V.A.* v. *Welch,* 327 U.S. 546, also cited by appellee, no judgment of a state court, nor any state law, was involved. After plenary review of the question raised as to whether the taking was for a public use, this Court affirmed the judgment below that the taking was not in violation of due process.

The taking in each of these cases cited by appellee excepting the *Vester* Case (for a railroad siding in the *Hairstone* Case; for a highway in the *Rindge* Case and as necessary to a T.V.A. Dam and Reservoir in the *Welch* Case) were for specific present uses which seemed obviously public. Yet this Court did not regard as unsubstantial in any of them the question as to whether the taking was for a public use, and it carefully reviewed each of them in plenary proceedings. In the *Vester* Case, no specific present or future public use was alleged nor shown, and as held by this Court and the court below, the taking violated the constitutional requirement of due process.

Appellee further suggests that the said question is not substantial because of the statements of this Court in the *Hairstone* and *Vester* Cases as to its appropriate regard to the diversity of local conditions and local extigencies. And in this respect appellee places great emphasis on the statement in the opinion below that the taking

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therance of the widening of the street, and why it was necessary for the complete enjoyment and preservation of the public use of the widened street are not stated and are thus left to surmise." In the present case the purpose of the taking and how it is to be in furtherance of the objects and purposes of the Land Administration Act is also left to surmise.

> "... constitutes a legitimate use of the public power for the protection of what, for a community of 2,712,808 human beings, struggling in a small territory of 3,435 square miles, is their most precious value for survival: Living space."

It was not, however, the purpose of the Land Administration Act, nor this taking, to increase the so called amount of "living space" (nor indeed can the amount of land available therefor be increased other than by filling swamp areas and embayments and other areas suitable therefor along the coastlines of Puerto Rico) but to (1) decrease the cost of living space and/or (2) stop alleged speculation in land and (3) force allegedly monopolistic landowners to part with their lands.

If by "living space" land is meant, the protection referred to must be protection against the evils alleged in the Act, namely (1) the monopolization of land, (2) speculation in land and (3) withholding it from use, i.e. from the market. But here appellants were not monopolizing or speculating in land nor withholding it from use. On the contrary, they were developing it for residential housing and an appropriate amount of commercial and industrial facilities, the recognized best use for which it was suitable. If by "living space" residential housing is meant, then appellants' development would increase the amount available and protect against an inappropriate use of the land.[3]

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[3] The development of the lands being carried out by Appellants was held by the Land Administration to be a development in bad faith because preliminary plans thereof had not been filed in the Planning Board prior to presentation in the Legislature of the bill which was enacted into the Land Administration Act, and this decreed bad faith was the reason or motive for the taking. Neither the said Act nor any other statute empowers the Land Administration to issue such a decree, nor is any public purpose served by a taking for such reason. The innate unfairness of such decree becomes more apparent in view of the arbitrary and unconstitutional suspension of the Planning Board Law by its President (and Vice Chairman of the Land Administra-

It is true that Puerto Rico is a relatively small land area and its overall density of population is slightly less than 800 persons per square mile. The density in the metropolitan area of San Juan is much greater—588,800 inhabitants according to the 1960 census,—(see Tables 1 to 11 in Series PC(1)A of *U.S. Census of Population 1960, Puerto Rico,* U.S. Department of Commerce) but when compared with urban areas in other parts of the United States and the world it does not present anything unique. Due to the program of grants of tax exemption to new industries and certain other specific industries, the fact that Puerto Rican source income is not taxable under the United States Internal Revenue Code, that corporate and partnership income taxes under Puerto Rican law are substantially lower than United States corporate income taxes, that wages have been lower than on the continent, and that incentives and other advantages have been available from the local government to capital investment in Puerto Rico during the past 15 years and at the present time, a tremendous industrial expansion has taken place and is taking place particularly in the metropolitn areas, especially San Juan, and with F.H.A. financing of housing and federal aid to public housing, the movement of rural population to urban centers has been very great particularly in the San Juan area. During the decade from 1950 to 1960 population in the San Juan metropolitan area increased 26.4%. (Pages 53-113, Table 32 of Series PC(1) of *U.S. Census of 1960, Puerto Rico,* U.S. Department of Commerce). Neither this urban growth nor the problems arising therefrom are unique to Puerto Rico but are essentially the same throughout the cities of the United States and other parts of the world.[4]

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tion) from July 11, 1961 (nearly a year before the Land Administration bill was presented) until June 1962 after the bill was enacted into law.

[4] Due to the subtropical climate neither artificial heating nor cold weather clothes are required in Puerto Rico as in the cities in continental United States.

One of the major problems of urban growth has been and is the increased cost of housing, one of the important elements of which is the increase in the cost of land. The evils of monopolization, speculation and withholding from the market are common throughout the United States. The problem is not the scarcity of land, "living space", but increased cost. The map forming part of the Scope of the Project (see Jurisdictional Statement, p. 127) shows large areas of vacant land in the metropolitan area of San Juan, and there is no evidence tending to show lack of land. Moreover, Puerto Ricans are United States citizens with unlimited access to any and all parts of the Nation. There is no reason for the struggle in Puerto Rico to be any more severe than in other parts of the Nation. Puerto Ricans recognize this, and the number who have moved to continental United States in the past has been extensive, there being today some 2,000,000 Puerto Ricans who presently reside in continental United States.

While local conditions and exigencies will receive great respect and consideration by this Court certainly there are none here involved that would justify the condemnation of land for other than a public use, in violation of constitutional due process, nor to make the question as to public use here raised a question without substance.

Appellee finally urges that the said question is not substantial in view of this Court's statement in the *Welch* Case (ibid 327 U.S. 552) that

> "... But whatever may be the scope of the judicial power to determine what is a 'public use' in Fourteenth Amendment controversies, this Court has said that when Congress has spoken on this subject 'Its decision is entitled to deference until it is shown to involve an impossibility.' *Old Dominion Land Co.* v. *United States*, 269 U.S. 55, 66, 70 L. ed. 162, 46 S. Ct. 39."

Mr. Justice Holmes made this statement in the *Old Dominion Land Co.* Case in answer to the contention that the property taken was not for "Sites for Military Purposes . . . For quartermaster warehouses . . ." as specifically set out in one of the Congressional Acts involved, but to prevent warehouses built on the property by and belonging to the United States from reverting to the landowner upon expiration of the time to remove them upon termination of a lease. The taking in that case and the purpose thereof were specifically authorized by Congress, whereas the taking of Appellants' lands and purpose therefor were not specifically authorized by the Commonwealth Legislature. Obviously a taking for military sites—for quartermaster warehouses is a taking for a specific public purpose, and the eminent Judge's statement that until such use was shown to be an impossibility the Congressional declaration would be respected is obviously sound. (See *6 Nichols on Eminent Domain,* 237). That statement, however, does not mean that the question of whether a taking is for a public use is not in the ultimate analysis, a judicial question. All of the said cases cited by appellee hold the question to be a judicial question, and while Mr. Justice Black also said in the majority opinion in the *T.V.A.* Case (immediately following the quotation of the statement of Mr. Justice Holmes as to impossibility)

> "... Any departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proven impracticable in other fields."

Mr. Justice Frankfurter in his concurring opinion (327 U.S. 557-558) tells us, however, that

> "'. . . But the fact that the nature of the subject matter gives the legislative determination nearly immunity from judicial review does not mean that the power of review is wanting. All the cases cited in the Court's opinion sustaining a taking recognize and accept the power of judicial review. I assume that in citing these cases the Court again recognizes the doctrine that whether a taking is for a public purpose is not a question beyond judicial competence."

And Mr, Justice Douglas, speaking for this Court in unanimity so stated in the subsequent case of *Berman* v. *Parker*, (348 U.S. 26, 32) pointing out, however, that

> "The rule of the judiciary in determining whether that power (eminent domain) is being exercised for a public purpose is an extremely narrow one." (Ibid. 348 U.S. 33).

In the case of the *People of Puerto Rico* v. *Eastern Sugar Associates*, 156 F. 2d 316, 321, cert. den. 67 S. Ct. 190. 329 U.S. 771, 91 L. ed. 664, it was said

> ". , . Thus, since the lands are sought to be condemned 'to carry out *all* (italics supplied) of the objects or purposes of the Land Law'. and condemnation is sought both under that law and the Vieques Act, the lands may eventually be put if the appellant prevails, to any one or all of the four uses. Therefore, if one of these uses, each considered, however, as a part of a broad, integrated program of agrarian reform as will be pointed out hereafter, is not public, the petition was properly dismissed."

(See also *City of Cincinnati* v. *Vester*, 281 U.S. 439, 446, 74

L. ed. 950, 954-955, 30 S. Ct. 360, and the Opinion of the Superior Court below).

How the Land Administration could know or assert that the lands were taken for any and all of the purposes and objects of the Land Administration Act, when neither it nor any other branch of the Commonwealth Government had any known need or use for the lands immediately or in the future, nor any plans or projects for their use, is difficult if not impossible or reasonable conception.

That the taking is for the establishment of a reserve of land to be retained for a possible future public use offers no solution to the problem, for again since there are no plans or projects made or in the making, nor any master plans, it was not possible for appellee to have known of any use to which the Commonwealth might put the lands in the future. Since the power of eminent domain is always available, why not await the time the lands may be needed for a public use, presently or within a reasonably foreseeable time rather than blindly taking them now without knowing whether they will be needed for any public purpose? Retention of land in reserve would reduce the available supply of land and tend to increase price, and it would prevent its use—use for instance as living space. Section 7(q) of the Land Administration Act (Jurisdictional Statement, pp. 145-147) empowers the Land Administration

> "To acquire, in the manner provided in this Act, private property and keep it in reserve for the benefit of the People of Puerto Rico, for the use of the Commonwealth of Puerto Rico or its agencies. . .".

and there is no limitation on the amount of time the land may be held in reserve, except that whenever land is condemned for specific purposes of public-work development and social welfare, such purposes shall be carried out in a period of years that does not exceed 15.

Certainly there is no public purpose or use involved in taking and holding land in reserve for an unlimited period, nor indeed for 15 years, particularly since it may very well turn out that it will never be devoted to any public use. The purpose or object for the reserve appears in sub-paragraph (c) of the Statement of Motives of the Act (Jurisdictional Statement, p. 141) where it is declared that the rising price of land "affects or prevents the implementing of the master plans", and in substance that by acquiring (land) now before the price further increases, money will be saved on any public project in which the land may be used at some time in the future—and if it turns out there is no public need or use for it at some time in the future it can be sold at a profit.[5] But there are no master plans to be implemented, and the possibility of a saving, a profit, to the taker does not satisfy the constitutional requirement of public purpose other than a profit to the taker (*Brown* v. *United States*, 263 U.S. 78, 84, 44 S. Ct. 92, 94, 68 L. ed. 171, 181; see also *City of Cincinnati* v. *Vester*, supra). Moreover, since the price of the land taken may decrease rather than increase, even the advantage of a saving or profit, might not result from the taking. Or it is possible that the increased price be less than the cost of acquisition plus, interest on investment plus cost of maintenance plus taxes.[6] The matter is one of speculation to say the least.

Furthermore, as set out in question 4 raised (Jurisdictional Statement, pp. 32-35, the land condemned may also be used to effectuate price control in violation of the due process

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[5] The Act empowers the Land Administration to sell its lands in the normal course of its operations, to sell it when it no longer regards the land as useful for the purposes of the Act, after first offering it to the former owner, or his heirs, at a price not less than market value at the time of such offer. (See Section 7(k) and (l) and Section 14(g).

[6] The Act provides that the Land Administration shall pay taxes on its land.

and equal protection of the laws clauses of the Fifth and Fourteenth Amendments. Surely that use would not be for a public purpose.

As said in *People of Puerto Rico* v. *Eastern Sugar Associates*, supra, at 156 F. 2d 324

> "... Our function is to pass upon the statutes before us without regard to our views of the wisdom of the political theory underlying them; (*McLean* v. *Arkansas*, 211 U.S. 539, 547, 29 S. Ct. 206, 53 L. ed. 315) it is our duty to determine whether their enactment rested upon an arbitrary belief of the existence of the evils they were intended to remedy, and whether the means chosen are reasonably calculated to cure the evils reasonably believed by the Legislature to exist. *Tanner* v. *Little*, 240 U.S. 369, 385, 36 S. Ct. 379, 60 L. ed. 691..."

Assuming that land speculation, land monopolization, and withholding of land from the market and the consequent increase in the price of land and of housing are existing evils, as we have shown (Jurisdictional Statement, pp. 32-36) the means chosen by the statute are not reasonably calculated to cure those evils. Those means, viz., the condemnation of land, the subsequent sale to a housing developer at less than cost (and hence less than market value) upon condition that he limit the potential profits on sales of the units constructed to the purchasers, undetermined and indeterminate—involve unconstitutional means of price control in unfair competition with other housing developers, and merely encourage speculation by the purchasers of the units. Moreover, it is the subsidy given—sale of land below cost—which brings about a decrease in the price of the units constructed, not the condemnation. If thought neeessary such a subsidy can be granted to persons determined to be in need of it without condemnation of lands which merely

increase the cost of land and hence the amount of the subsidy. And if the land is not sold at less than its cost (market value plus cost of taking) no reduction in cost of housing would result.

As we have said, the retention of land in reserve with the object of saving on the cost of some possible public project in the future, or of making a profit on its sale if not devoted to a public use, does not satisfy the constitutional requirement of public use. Moreover, it does not constitute means reasonably calculated to cure the declared evil of the increasing price of land.

The power of eminent domain is more harsh and peremptory in its exercise and operation than any other (*2 Nichols, Eminent Domain,* 2d Ed., pp. 987-989) and obviously it is not to the public benefit that it be employed when not necessary and not calculated to cure the evils for which its exercise is authorized.

In this case, there was no land speculation, no monopolization of land, and no withholding of land from the market. On the contrary, appellants were developing their lands for admittedly the best use—a housing development—pursuant to the applicable law and regulations of the Planning Board, and considerable work had been done with the approval of the Planning Board and other Government Agencies in the development, as pointed out in the Jurisdictional Statement. The only and real reason for the taking was that the preliminary plans of the development had not been officially filed with the Planning Board at the time the bill enacted into the Land Administration Act was presented to the Legislature, although they had been discussed with the Board. The Executive Director of the Land Administration said that the lands would not be condemned if the Planning Board approved the develop-plans, and the Planning Board refused to approve the plans, not because they were were not in full accord with the law and regulations and in accord

with the best and most efficient use to which the lands could be put, but because preliminary plans had not been filed at the time stated, i.e., that they were filed in bad faith as decreed by the Governing Board of the Land Administration, and the Land Administration had become interested in acquisition of the lands. And the Planning Board's unconstitutional suspension of the law in July 1961—actually prior to acquisition of all of the lands by appellants—was the cause for not having filed the plans earlier.

It is submitted that the first question is substantial, and should be reviewed by this Court in plenary proceedings.

Second Question

Appellee contends this question is not substantial because it amounts to no more than an attempt to disturb the Commonwealth Supreme Court's construction of the Land Administration Act, a local statute, citing in support of this contention *Bonet* v. *Texas Co.*, 308 U.S. 436, 470, wherein this Court reaffirmed the doctrine that to justify a reversal of the Commonwealth Supreme Court's interpretation of a local statute, the error must be clear or manifest; the interpretation must be inescapably wrong; the decision must be patently erroneous.

The Commonwealth Supreme Court in its opinion in the present case held and said

> "The Scope of the Project approved by the Planning Board constituted a master plan in itself . . ."

(Jurisdictional Statement, final paragraph of footnote p. 100). And in effect it said that the taking was to implement this master plan, was clearly authorized by the statute and not inviolation of constitutional due process of law. Yet appellee in response to Request For Admissions had

categorically denied that the Scope of the Project was a master plan (Record, par. 50, p. 224). And in answer to Interrogatories appellee had stated that the Planning Board had not prepared or adopted a master plan for the area embraced in the Scope of the Project, nor any part thereof (Record, pars 29 and 30, p. 235 and pars. 29 and 30, p. 244).

As we pointed out (Jurisdictional Statement, p. 13, footnote 13) local law specifically and expressly requires notice and public hearings prior to adoption and approval by the Planning Board of any master plan and approval by the Governor of Puerto Rico. Appellee admitted that the Scope of the Project was approved by the Planning Board without any notice or public hearings. (Record, par. 47, p. 224 and par. 47, p. 227).

This decision of the Commonwealth Supreme Court that the Scope of the Project was a master plan is clearly and manifestly erroneous, it is inescapably wrong and is patently erroneous. It more nearly represents a total and utter disregard of local statutory law rather than a construction or interpretation thereof.

There are it is believed several other clear, manifest, inescapable and patent errors in the decision of the Commonwealth Supreme Court which, it is believed, may be more appropriately briefed and argued in plenary proceedings.

A taking of private property by a government agency, official or corporation without, or contrary to, statutory authority violates constitutional due process, and it is therefore submitted that the second question is substantial.

Third Question

It is said by appellee that this question is not substantial because it is a hypothetical matter and not supported by a genuine controversy.

As we have heretofore pointed out where a taking is

declared to be for any or all of the objects or purposes of a statute, if any one of those objects or purposes does not satisfy the constitutional requirement of public use the taking violates due process of law. (See *People of Puerto Rico* v. *Eastern Sugar Associates,* and *City of Cincinnati* v. *Vester,* supra).

To sustain appellee's contention that this third question is not substantial the statement of this Court in the Vester Case that it will not decide important constitutional questions unnecessarily or hypothetically, is cited.

In the Vester Case this Court held that (1) legislative declarations and decisions of state courts as to what constitutes a public use are binding on it when called upon to determine whether the taking is without due process as being for a non-public use; (2) that a statement by a government agency (City Council) that an excess condemnation, sought in connection with a taking of property for public use, is in furtherance of such public use, is not conclusive; (3) that a statutory requirement that a declaration of intent to condemn property shall define the purpose of the appropriation is not satisfied by a general statement that it is in furtherance of and necessary for the complete enjoyment and preservation of said public use, and (4) we quote, (28 U.S. 448-449):

> "... The validity of the excess condemnation upon the ground of non-compliance with the state law was challenged in the bills of complaint in these suits. The respondents have made the same contentions here. The City has not met it by referring us to any decision of the courts of Ohio construeing the statute involved or sustaining the excess appropriation in the absence of a definition of purpose. It is an established principle governing the exercise of the jurisdiction of this Court that it will not decide important constitutional questions unnecessarily or hypothetically...."

And this Court affirmed the decrees of the United States District Court restraining the taking by the City.

In the present case the question raised is under the rule that where the taking is for any or all of the objects or purposes of the statute, if any one is not a taking for a public purpose the taking will be in violation of due process, and we have pointed out (Jurisdictional Statement, par. 4, pp. 32-36) uses of the property permitted under the statute which we contend are not public uses and that violate due process of law and the equal protection of the laws and represent means not reasonably calculated to cure the evils declared by the statute to exist.

We submit that there is nothing hypothetical in this question, that its solution is necessary, that the court below decided it and that its decision is clearly, manifestly, inescapably and patently erroneous, and that this Court is not bound by the decision. We submit, therefore, that the question is substantial.

Fourth Question

The Fourth Question (Jurisdictional Statement, par. 5, pp. 36-37) is not substantial, appellee contends, because (1) we do not "identify the federal source necessary in order" to enable this Court to determine the question as whether the statute violates the constitutional doctrine of separation of powers, and (2) because the violation of a state's own requirement as to separation of powers does not present a substantial question under the Constitution.

Section 1 of Article I of the Constitution provides that all legislative powers granted therein shall be vested in the Congress. The second paragraph of Section 3 of Article IV of the Constitution extends this legislative power to territories in the following terms:

> "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States; . . .".

In the exercise of such power the Congress authorized the adoption by the People of Puerto Rico of a constitution which would provide a republican form of government and would include a bill of rights which if found by the President of the United States to be in accordance with the authority granted and in conformity to the provisions of the Constitution would be transmitted to the Congress, and when approved by the Congress would be effective in accordance with its terms. (Public Law 600, 81st Congress). Such a constitution was adopted, transmitted to the Congress and approved by it with certain amendments, among which was a provision that "any amendment or revision of this constitution shall be consistent with the resolution enacted by the Congress of the United States approving this constitution, with the applicable provisions of the Constitution of the United States, with the Puerto Rican Federal Relations Act, and with Public Law 600, Eighty-first Congress, adopted in the nature of a compact." (Public Law 447, 82nd Congress). The said amendments were accepted by the People of Puerto Rico January 29, 1953. (1 LPRA, pp. 148-149) and Section 3 of Article VII of the Commonwealth Constitution provides that any amendment or revision shall be consistent with the applicable provisions of the Constitution of the United States, etc. (1 LPRA, p. 259).

Thus the Commonwealth Constitution is not only an Organic Act approved by the people of Puerto Rico within the basic standards and safeguards and policy specified by the Congress, but is also legislation authorized by, adopted and approved by the Congress under the powers to dispose

of and make rules and regulations as to the territories. And any revision or amendment must be in conformity with the Constitution of the United States. Article III of the Commonwealth Constitution which vests legislative power in the Legislative Assembly is in accord with Section I, Art. 1 of the Constitution of the United States, and with the concept of a republican government one of the basic tenets of which is the doctrine of separation of powers, and neither the Legislative Assembly, nor the Supreme Court of Puerto Rico, nor the Governor of Puerto Rico, it is submitted, may abrogate this provision without violation of the Constitution of the United States and the doctrine of the Separation of Powers embraced in the Constitution. The Legislative Assembly of the Commonwealth, it is submitted, has now power, in fact and law, to delegate legislative powers to any other department of the Commonwealth Government, as here, for instance, a public corporation within and controlled by the Executive Department.

There are many diverse views in Puerto Rico and elsewhere as to constitutional nature of the Commonwealth of Puerto Rico running the full gamut from a sovereign and separate state or republic linked to the United States by mutual agreement, through a self-governing territory to a mere unincorporated territory with an Organic Act adopted by the Congress and subject to the latter's powers under Section 3 of Article IV of the Constitution. In the United Nations, the official view of the Federal Government seems to be that the Commonwealth is a self-governing territory subject to the provisions of the Constitution of the United States. Conceivably this Court might hold that the Congress has disposed of Puerto Rico as a Territory, acting under its powers under Section 3 of Article IV of the Constitution, but upon certain conditions one of which is that it be subject to the provision

of the Constitution that Legislative powers be vested in the Legislative Assembly of the Commonwealth and not elsewhere. The term "territory" as used in Article IV, Section 3 of the Constitution was said by this Court to be merely descriptive of one kind of property, and is equivalent to the word "lands" (*U.S.* v. *Gratiot,* 39 U.S. 526, 14 Pet. 526, 10 L. ed. 573), and Congress may limit the disposition of land by such conditions as it regards as necessary or beneficial (*United States* v. *San Francisco,* 310 U.S. 16, Reh. den. 657).,

Puerto Rico is obviously not a state in the sense of the word when applied to a state of the Union. It was not one of the original states and has never been admitted as a state. (See the discussion of Chief Judge Magruder in *Mora* v. *Mejias,* 206 F. 2d 377, 386-388). The cases cited by appellee on page 10 of its motion refer to states of the Union. The first *Dreyer* v. *Illinois,* 127 U.S. 71, sustained the validity of an indeterminate sentence law of Illinois and of the Board created thereby. The standards and guides set up by the statute, it is submitted, made the functions of the Board administrative and there was no delegation of legislative powers. The second case cited, *Carter* v. *Caldwell,* 200 U.S. 293 reversed the Circuit Court's grant of a writ of habeas corpus and discharged applicant from appearance as a witness before a legislative committee of West Virginia, on the ground that the matter was one for the courts of the state. In the third case, *Prentis* v. *Atlantic Coast Line Co.,* 211 U.S. 210, this Court, per Mr. Justice Holmes for the majority held that an order of the Virginia State Corporation fixing passenger rates, from which an appeal to the Supreme Court of Virginia lay, even though assumed to be confiscatory, should, as a matter of comity, be attacked by petitioner on appeal to the state Supreme Court, prior to seeking to enjoin it in a Federal Court The remarks in the decision by Mr.

Justice Holmes as to the doctrine of separation of powers, it would seem, do not apply to the question raised in the present case,

It is submitted that the identity of the constitutional source of the doctrine of separation of powers is specified, and that the inclusion of that doctrine in the Commonwealth Constitution is the consequence of federal not state law, and that the fourth question is substantial.

Conclusion

For the above reasons and authorities it is submitted that appellee's motion to dismiss the appeal should be denied.

San Juan, Puerto Rico, August 28, 1968.

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